VW Credit, Inc. *and* Kelley Hellman.

Volkswagen Group of America, Inc. *and* Kelley Hellman. Cases 13–CA–158715 and 13–CA–166961

March 12, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On August 25, 2015, Kelley Hellman filed a charge against VW Credit, Inc. (Respondent VW Credit) in Case 13–CA–158715. The General Counsel issued a Complaint and Notice of Hearing, and Respondent VW Credit filed an answer. On January 4, 2016, Hellman filed a charge against Volkswagen Group of America, Inc. (Respondent VGoA) in Case 13–CA–166961, and the General Counsel issued an Order consolidating cases, amended consolidated complaint, and notice of hearing in Cases 13–CA–158715 and 13–CA–166961. On April 6, 2016, the General Counsel issued a Corrected Order consolidating cases, amended consolidated complaint, and notice of hearing (complaint), in which he alleged that Respondent VW Credit and Respondent VGoA (collectively, Respondents) each violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) by maintaining "a mandatory arbitration agreement for certain of its employees that employees reasonably would believe bars or restricts their right to file charges with the Board." The Respondents filed a joint answer.

On September 2, 2016, the Respondents, the Charging Party, and the General Counsel filed a joint motion to waive a hearing and a decision by an administrative law judge and to transfer this proceeding to the National Labor Relations Board for a decision based on a stipulated record. On December 2, 2016, the Board granted the parties' joint motion. Thereafter, the Respondents (jointly) and the General Counsel filed briefs, and the Respondents (jointly) and the General Counsel filed answering briefs.

In support of the Complaint's allegation that the Respondents unlawfully maintained the disputed arbitration agreement, the General Counsel relied on the "reasonably construe" prong of the standard the Board set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (*Lutheran Heritage*).[1] Subsequently, in *Boeing Co.*, 365 NLRB No. 154 (2017), the Board overruled the "reasonably construe" prong of *Lutheran Heritage* and replaced it with a new standard, summarized below in footnote 2.[2] The Board in *Boeing* also decided to apply the new standard retroactively to all pending cases. 365 NLRB No. 154, slip op. at 16–17.

On October 29, 2018, the Board issued a Notice to Show Cause why the Board should not revoke its approval of the stipulation and remand this case to the Regional Director for Region 13 for further proceedings in light of *Boeing*. The Respondents and the General Counsel each filed a response to the Notice to Show Cause. The General Counsel opposed remand. The Respondents sought remand or, alternatively, permission to file a supplemental

[1] In *Lutheran Heritage*, the Board held that an employer violates Sec. 8(a)(1) of the Act "when it maintains a work rule that reasonably tends to chill employees in the exercise of their Sec[.] 7 rights." 343 NLRB at 646. The maintenance of a rule is unlawful if the rule explicitly restricts activities protected by Sec. 7. Id. If a rule does not constitute such an explicit restriction, its maintenance remained unlawful under *Lutheran Heritage* if "(1) employees would reasonably construe the language to prohibit Sec[.] 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Sec[.] 7 rights." Id. at 647.

[2] Under *Boeing*, the Board first determines whether a challenged rule or policy, reasonably interpreted, would interfere with the exercise of rights under Sec. 7 of the Act. If not, the rule or policy is lawful. If so, the Board determines whether an employer violates Sec. 8(a)(1) of the Act by maintaining the rule or policy by evaluating two things: "(i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule." Id., slip op. at 3 (emphasis in original). In conducting this evaluation, the Board will strike a proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policies, viewing the rule or policy from the employees' perspective. Id. "As the result of this balancing . . . the Board will delineate three categories" of work rules:

> *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. . . .
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> *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
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> *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

Id., slip op. at 3–4 (emphasis in original). The subdivisions of Category 1 were subsequently redesignated 1(a) and 1(b). See *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 fn. 2 (2019). In addition, placement of a rule or policy in Category 1(a) does not result from balancing NLRA rights and legitimate justifications. See id., slip op. at 2 (for a Category 1(a) rule, "there is no need for the Board to take the next step in *Boeing* of addressing any general or specific legitimate interests justifying the rule"). The *Boeing* standard replaced only the "reasonably construe" prong of *Lutheran Heritage*. Other aspects of *Lutheran Heritage* remain intact, including whether a challenged rule or policy explicitly restricts activities protected by Sec. 7. See above, fn. 1.

brief analyzing the arbitration agreement under *Boeing*. Because this case solely concerns the lawfulness of an arbitration agreement that is already in the record before us, we find that a remand is unnecessary. And because the analysis of that agreement is governed by well-settled precedent, we also find supplemental briefing unnecessary. Accordingly, we will decide the case on the stipulated record, informed by the parties' briefs.

On the entire record and briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent VW Credit, a subsidiary of Respondent VGoA and a corporation with offices and places of business in Herndon, Virginia, and Libertyville, Illinois, has been engaged in the business of providing financing services to Volkswagen automobile purchasers and lessors. During the calendar year preceding issuance of the Complaint, a representative period, Respondent VW Credit derived gross revenues in excess of $500,000 and, during the same period, purchased and received goods, products, and materials in excess of $5000 directly from points outside the State of Illinois.

At all material times, Respondent VGoA, a corporation with an office and place of business in Herndon, Virginia, and at various locations throughout the United States, has been engaged in the business of manufacturing and distributing Volkswagen automobile products. During the calendar year preceding issuance of the Complaint, a representative period, Respondent VGoA derived gross revenues in excess of $500,000 and, during the same period, purchased and received goods, products, and materials in excess of $5000 directly from points outside the Commonwealth of Virginia.

We find that the Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

Since about February 26, 2015, Respondent VW Credit and Respondent VGoA have maintained, on a corporate nationwide basis, a mandatory "Agreement to Arbitrate" (Agreement) for certain of their employees,[3] who are required to sign and date a copy of the Agreement. The Agreement contains the following provisions and is applicable, by its terms, to VGoA and any of its affiliated entities, including VW Credit (collectively, VWGoA):

> 1.) Introduction. In any organization, disputes will arise from time to time. Occasionally, these disputes need to be resolved in a formal proceeding. Traditionally, this has taken place in the courts after a lawsuit has been filed. However, too often, our court system has proven itself to be exceedingly costly and time-consuming. In order to obtain a ruling on future disputes without the costly expense and lengthy delays typically associated with court actions, Employee and VWGoA agree to submit (with exceptions noted below) claims or controversies relating to Employee's employment (or the termination of that employment) to final and binding arbitration before a neutral arbitrator and not to any court, as specified in greater detail below.
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> 2.) Submission to Arbitration. Any and all disputes which involve or relate in any way to Employee's employment (or termination of employment) with VWGoA, whether initiated by Employee or by VWGoA, shall be submitted to and resolved by final and binding arbitration. However, nothing in this Agreement shall be construed to restrict or prevent either party from pursuing injunctive relief in a court of competent jurisdiction.
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> 3.) Waiver of Right to Jury Trial. I understand that by entering into this Agreement, I am waiving any right I may have to file a lawsuit or other civil proceeding relating to my employment with VWGoA, and that I am

[3] The Agreement applies to all employees employed by Respondent VW Credit and Respondent VGoA, including all employees of the following: VCI Service Center in Portland, Oregon; Electronic Research Lab in Belmont, California; Test Center California in Oxnard, California; Design Center California in Santa Monica, California; Parts Distribution Center in Ontario, California; Port in San Diego, California; VWI/Audi/VCI Western Region in Woodland Hills, California; Proving Grounds in Phoenix, Arizona; Proving Grounds in Alaska; Audi Testing Lab in Golden, Colorado; VW/VCI South Central Region in Irving, Texas; Parts Distribution Center in Fort Worth, Texas; Port in Houston, Texas; Parts Distribution Center in Jacksonville, Florida; VW Group Latin America in Miami, Florida; Port in Brunswick, Georgia; VW/Audi/VCI in Alpharetta, Georgia; Parts Distribution Center in Knoxville, Tennessee; Corporate Headquarters in Herndon, Virginia; Parts/Region Distribution Center in Cranbury, New Jersey; Port in Wilmington, Delaware; Product Liaison Group in Ridgefield, Edgewater, and Allendale, New Jersey; EEO, Audi Test Fleet in Allendale, New Jersey; VW/Audi/VCI Eastern Region in Woodcliff Lake, New Jersey; Customer Relations & After Sales Support Center, EEO in Auburn Hills, Michigan; Parts Distribution Center in Pleasant Prairie, Wisconsin; VCI Service Center in Libertyville, Illinois; and VW/Audi/VCI Central Region in Chicago, Illinois. The Agreement also applies to some employees at U.S. Manufacturing CVS in Chattanooga, Tennessee.

waiving any right I may have to resolve employment disputes through a jury trial.

4.) Covered Claims. This Agreement is intended to cover all civil claims which relate in any way to my employment (or termination of employment) with VWGoA including, but not limited to, arbitrable claims of employment discrimination or harassment on the basis of race, sex, age, religion, color, national origin, sexual orientation, disability and veteran status (including any local, state or federal law concerning employment or employment discrimination), claims based on violation of public policy or statute, and claims against individuals or entities employed by, acting on behalf of, or affiliated with VWGoA ("Claims"). However, claims for workers' compensation or for unemployment compensation benefits are not covered by this Agreement. Nor are claims for injunctive or equitable relief to enforce non-competition or non-solicitation covenants, or to prohibit unfair competition or the unauthorized disclosure of trade secrets or other proprietary information covered by this Agreement. Finally, union related matters or disputes governed by a collective bargaining agreement and ERISA matters which are covered by an ERISA plan with a dispute resolution provision are not covered by this Agreement. The statutes of limitations otherwise applicable under law shall apply to all Claims made in the arbitration.

10.) Arbitrator's Authority. The arbitrator shall have no authority to hear or decide any matter that was not processed in accordance with this Agreement. The arbitrator shall have exclusive authority to resolve any Claims, including, but not limited to, a dispute relating to the interpretation, applicability, enforceability or formation of this Agreement. The arbitrator shall have the authority to award any form of remedy or damages available in a court.

22.) Modifications to Agreement. This Agreement may be modified or amended only by a writing signed by me and by an officer of VWGoA[,] which specifically references this Agreement. No employee or agent of VWGoA is authorized to make any agreement, understanding or arrangements to the contrary.

On about October 30, 2015, Respondent VW Credit sent a notice to employees, titled "CHANGE TO VW CREDIT, INC. EMPLOYEE AGREEMENT TO ARBITRATE," which stated in relevant part as follows (emphasis in original):

If you joined VCI (or VWGoA) in or after 1999, you likely signed a document entitled "Agreement to Arbitrate," along with a number of other new-hire forms. This Agreement provided, among other things, that you and the Company agreed to have certain employment disputes resolved through arbitration, rather than litigation and trial. Recently the National Labor Relations Board ("NLRB") looked at the form of our Agreement to Arbitrate. The Board thought that we could be clearer that the arbitration agreement does <u>not</u> restrict your rights to file charges with the NLRB. We agreed to make this clarification.

Accordingly, because it is your legal right to join a union and file charges with the NLRB, we are revising your Agreement to Arbitrate to include the following:

"This Agreement does not restrict your rights to file charges with the NLRB."

We will send you a copy of this notice by email. Since we don't plan to issue new Agreements, please keep a copy of this notice along with your copy of your Agreement to Arbitrate.

On about January 27, 2016, Respondent VGoA sent a notice to employees (dated January 26, 2016), titled "CHANGE TO VOLKSWAGEN GROUP OF AMERICA'S ARBITRATION AGREEMENT," which stated in relevant part as follows (emphasis in original):

Recently the National Labor Relations Board ("NLRB") looked at our form of Arbitration Agreement. The Board thought that we could be clearer that the Arbitration Agreement does not restrict your rights to file charges with the NLRB. We agree.

Because you are always free to join a union and file charges with the NLRB, we will read your Arbitration Agreement to include the following:

"This Agreement does not restrict your rights to file charges with the NLRB."

Please keep a copy of this notice with your copy of your Arbitration Agreement.

B. The Parties' Contentions

The parties' joint stipulation includes the following statement of issues:

1. Whether Respondents' mandatory arbitration agreement interferes with, restrains, or coerces employees in the exercise of the rights guaranteed under Section 7 of the Act in violation of Section 8(a)(1) of the Act.

2. Whether Respondents' Notices to Employees met the Act's full remedial purposes.

The Respondents contend that the Agreement is lawful because it does not seek to compel arbitration of claims arising under the NLRA. Noting that the Agreement's first paragraph, headed "Introduction," focuses on disputes that have "[t]raditionally" been resolved "in the courts after a lawsuit has been filed," they contend that the Agreement makes clear that its purpose is to avoid the "costly" and "time-consuming" court system. They then argue that because NLRA charges must be filed with the Board and are not "[t]raditionally" resolved "in the courts after a lawsuit has been filed," reasonable employees would understand that the Agreement does not apply to claims arising under the Act.

In addition, the Respondents contend that no violation should be found because the notices to employees repudiated any alleged unlawfulness in the Agreement under *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).[4] The Respondents claim that the notices were issued shortly after they became aware of the General Counsel's position that the Agreement was unlawful and adequately explained to employees that the Agreement was being amended to make it clear that employees retained the right to file charges with the Board. The Respondents further claim that the Agreement, as amended by the notices, lawfully informed employees that the Agreement does not restrict their right to file charges with the Board.

Citing *U-Haul Co. of California*, 347 NLRB 375 (2006), enfd. mem. 255 Fed. Appx. 527 (D.C. Cir. 2007), the General Counsel contends that the Agreement is unlawful because reasonable employees would read it to restrict their right to file charges with the Board and to access its processes. Disputing the Respondents' claim that the scope of the Agreement is limited to actions that start out in court, the General Counsel emphasizes that the Agreement expressly applies to "all civil claims which relate in any way to [employee's] employment (or termination of employment) . . . [and] claims based on violation of . . . statute," which includes claims arising under the Act. The General Counsel observes that although the Agreement excludes "union related matters or disputes governed by a collective bargaining agreement," it does not exclude from the scope of the Agreement many other types of NLRA claims, including those involving protected concerted activity in a nonunion workplace.

The General Counsel also contends that the notices did not render the Agreement lawful. He argues that the notices do not satisfy all the requirements for repudiation under *Passavant*, and he further argues that the "savings clause" language in the notices, when read together with the rest of the Agreement, does not clearly inform employees that the Agreement permits them to file a charge with the Board. Finally, the General Counsel maintains that simply sending the notices to employees was inadequate to remedy the Respondents' unlawful maintenance of the Agreement.

C. Discussion

1. The Agreement to Arbitrate is Unlawful

a. The Agreement does not include the "savings clause" language contained in the notices.

Each of the Respondents sent a notice to employees covered by the Agreement. The title of the notices announced a "Change" to the Agreement. The notice sent by Respondent VW Credit stated that VW Credit was revising the Agreement to include the following sentence: "This Agreement does not restrict your rights to file charges with the NLRB." The notice sent by Respondent VGoA stated that Respondent VGoA "will read your Arbitration Agreement to include" the same sentence.

Despite appearances, the notices did not change the Agreement. The Agreement expressly provides that it "may be modified or amended *only* by a writing signed by [the employee] and by an officer of VWGoA" (emphasis added). The notices were not such a writing. Moreover, the stipulated record contains no evidence that the Respondents, or either of them, have ever modified the Agreement in the manner specified therein as to any employee, much less that they have done so for all employees who signed the Agreement.

b. The Agreement unlawfully interferes with employee access to the Board.

Having found that the notices to employees did not modify or amend the Agreement to add "savings clause" language, we next consider whether the Agreement unlawfully interferes with the right of employees to access the Board and its processes. For the following reasons, we find that it does.

"Under Section 10(b) of the Act, the Board has no power to issue complaint unless an unfair labor practice charge is filed." *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, slip op. at 5 (2019). But while limiting the Board's power in this way, Congress also protected it by providing, in Section 10(a) of the Act, that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that

[4] For a repudiation to serve as a defense to an unfair labor practice allegation under *Passavant*, the repudiation must be timely, unambiguous, specific, and untainted by other unlawful conduct. Id. at 138. In addition, there must be adequate publication of the repudiation to the employees involved, and the repudiation must assure employees that, going forward, the employer will not interfere with the exercise of their Sec. 7 rights. Id. at 138–139.

has been or may be established by agreement, law, or otherwise." Since the Board's ability to prevent unfair labor practices depends *entirely* on the filing of unfair labor practice charges, we held in *Prime Healthcare* that Section 10(a) is a clear congressional command that arbitration agreements that interfere with an employee's right to file charges with the Board cannot be lawfully maintained or enforced, notwithstanding the Federal Arbitration Act. 368 NLRB No. 10, slip op. at 5.

Thus, we held in *Prime Healthcare* that an arbitration agreement that explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies must be found unlawful because such an agreement constitutes an explicit prohibition on the exercise of employee rights under the Act. Id. Where an arbitration agreement does not contain such an explicit prohibition but rather is facially neutral, the standard set forth in *Boeing* applies. Id. Under that standard, the Board determines whether the arbitration agreement at issue, "when reasonably interpreted, would potentially interfere with the exercise of NLRA rights." *Boeing*, 365 NLRB No. 154, slip op. at 3.[5] If it does, *Boeing*'s balancing test applies. 365 NLRB No. 154, slip op. at 3. However, as we explained in *Prime Healthcare*, an arbitration agreement that makes arbitration the *exclusive* forum for resolving all employment-related claims—and therefore, the exclusive forum for resolving claims arising under the NLRA—"impair[s] employee rights, the free exercise of which is vital to the implementation of the statutory scheme established by Congress in the National Labor Relations Act." 368 NLRB No. 10, slip op. at 7. Accordingly, we concluded that "[n]o legitimate justification outweighs, or could outweigh, the adverse impact of such provisions on employee rights and the administration of the Act." Id. Therefore, such a provision in an arbitration agreement falls within *Boeing* Category 3 and cannot be lawfully maintained. Id.

Applying these principles, we find that the Agreement at issue here interferes with employee rights under the Act and falls within *Boeing* Category 3. Although the Agreement does not explicitly prohibit charge filing, and although it excludes some NLRA claims from coverage, it makes arbitration the exclusive forum for resolving many claims arising under the Act. Accordingly, when reasonably interpreted, it impermissibly interferes with the right to file charges with the Board.

To begin, the Agreement states that "[a]ny and all disputes which involve or relate in any way to Employee's employment (or termination of employment) with VWGoA . . . shall be submitted to and resolved by final and binding arbitration." The Agreement further provides that "[t]he arbitrator shall have exclusive authority to resolve any Claims," and it relevantly defines the term "Claims" to include "all civil claims which relate in any way to [Employee's] employment (or termination of employment) with VWGoA including . . . claims based on violation of . . . statute." Obviously, claims "based on violation of . . . statute" that "relate" to "employment (or termination of employment)" include claims for violation of the NLRA. Thus, without more, the foregoing language makes arbitration the exclusive forum for resolving claims for violation of the NLRA, which employees would reasonably interpret to restrict the filing of charges with the Board. See *Prime Healthcare*, 368 NLRB No. 10, slip op. at 6 (reasonably interpreted, provisions that make arbitration the exclusive forum for the resolution of all employment-related claims restrict the filing of charges with the Board); *Alorica, Inc.,* and its subsidiary/affiliate *Expert Global Solutions, Inc.,* 368 NLRB No. 25, slip op. at 1–2 (2019) (finding that an employer unlawfully maintained an arbitration agreement requiring all employment-related disputes, claims, or controversies to be resolved exclusively by final and binding arbitration).[6]

The Agreement does, however, exclude *some* claims arising under the Act from its scope—specifically, "union related matters or disputes governed by a collective bargaining agreement." But the Act's scope is not limited to such matters and disputes; it also encompasses, for example, employees' protected concerted activities unrelated to union matters or collective-bargaining agreements. At a minimum, then, employees would reasonably interpret the Agreement to restrict the filing of charges with the Board alleging interference with the right to engage in such activities. Thus, the agreement at issue here differs from arbitration agreements we have found lawful on the basis

[5] The "when reasonably interpreted" standard is an objective one and "looks solely to the wording of the rule, policy, or other provision at issue[,] . . . interpreted from the employees' perspective." *Prime Healthcare*, 368 NLRB No. 10, slip op. at 6 fn. 14.

[6] We are unpersuaded by the Respondents' contention that employees would understand the Agreement to apply only to claims first brought in court—and therefore not to claims for violation of the Act—based on the reference, in the Agreement's first paragraph, to arbitration as an alternative to "costly and time-consuming" formal proceedings that "[t]raditionally" take place in the courts. *Boeing* requires that we interpret the Agreement from "the perspective of employees," 365 NLRB No. 154, slip op. at 3, and it is unlikely that employees would be sufficiently familiar with different types of legal proceedings to distinguish NLRB proceedings from proceedings before a court. See *Prime Healthcare*, 368 NLRB No. 10, slip op. at 6 & fn. 12; *U-Haul Co. of California*, 347 NLRB at 377–378. Moreover, the broad language quoted above—including language that makes arbitration the sole means for resolving employment-related claims "based on violation of . . . statute," including, necessarily, the NLRA—contradicts the Respondents' argument concerning the limited scope of the Agreement.

that they altogether exclude from their scope claims arising under the Act.[7]

In sum, the language of the Agreement, reasonably interpreted, makes arbitration the exclusive forum for resolution of many types of claims arising under the Act. Accordingly, the Agreement restricts employee access to the Board, and such a restriction cannot be outweighed by any legitimate justification. *Prime Healthcare*, 368 NLRB No. 10, slip op. at 7. Therefore, the Agreement falls within *Boeing* Category 3, and we find that the Respondents violated Section 8(a)(1) of the Act by maintaining it.

2. The Respondents' Notices Did Not Cure the Violations

The Respondents continue to insist that the Agreement is lawful even *without* the "savings clause" language in the notices to employees. As just explained, we disagree and find to the contrary. In addition, we have also explained that because the notices to employees did not comply with the procedure specified in the Agreement for its modification or amendment, those notices failed to modify or amend the Agreement.[8] Finally, we reject the Respondents' contention that, even assuming the Agreement unlawfully restricted Board charge filing, the Respondents effectively repudiated the violation under *Passavant*, above. The contention is that by virtue of the notices, the Respondents adequately explained to employees that the Agreement was being revised to make clear that employees retained the right to file charges with the Board. But the explanation was ineffective unless the Agreement was, in fact, revised, and as we have explained, the notices did not revise the Agreement. Accordingly, the Respondents' *Passavant* defense necessarily fails.[9]

CONCLUSIONS OF LAW

1. The Respondents are employers within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board, the Respondents have engaged in an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act, and have violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondents unlawfully maintained a mandatory arbitration agreement that employees reasonably would believe bars or restricts their right to file charges with the Board, we shall order the Respondents to rescind or revise the unlawful agreement and to advise employees in writing that they have done so. Because the Respondents maintained the arbitration agreement on a nationwide basis, we shall also order that the Respondents post a notice at all of their facilities where the Agreement has been or is in effect. See *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007).

ORDER

A. The National Labor Relations Board orders that the Respondent, VW Credit, Inc., Herndon, Virginia, and Libertyville, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the Agreement to Arbitrate in all its forms, or revise it in all its forms to make clear to employees that the Agreement to Arbitrate does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign or otherwise became bound to the

[7] Compare *Bloomingdale's, Inc.*, 369 NLRB No. 8, slip op. at 1, 2–3 (2020) (finding that an arbitration agreement excluding "[c]laims . . . under the National Labor Relations Act" did not interfere with right to file charges with the Board); *Private National Mortgage Acceptance Company LLC*, 368 NLRB No. 126, slip op. at 3 (2019) (finding that an arbitration agreement excluding "any claims that could be made to the National Labor Relations Board" did not interfere with right to file charges with the Board).

[8] Aware, perhaps, of this difficulty, Respondent VGoA worded its notice in a way that suggested the Agreement already contained "savings clause" language—i.e., "we will read your Arbitration Agreement to include" the statement, "[t]his Agreement does not restrict your rights to file charges with the NLRB." But the Agreement does *not* include that statement, and the notices did not amend the Agreement to add that statement.

[9] Having found that the Respondents cannot mount a cognizable *Passavant* defense, we do not pass on whether the specific requirements set forth in *Passavant* constitute the proper standard for effective repudiation of an unfair labor practice. We also do not decide here whether the Agreement would have been lawful under *Prime Healthcare* and related precedent had it been revised to include the "savings clause" language contained in the notices to employees.

Agreement to Arbitrate in any form that the Agreement to Arbitrate has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at its facilities in Herndon, Virginia, and Libertyville, Illinois, and at all other VW Credit facilities where the unlawful arbitration agreement is or has been in effect, copies of the attached notice marked "Appendix A."[10] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix A" to all current employees and former employees employed by the Respondent at any time since February 26, 2015.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The National Labor Relations Board orders that the Respondent, Volkswagen Group of America, Inc., Herndon, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the Agreement to Arbitrate in all its forms, or revise it in all its forms to make clear to employees that the Agreement to Arbitrate does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign or otherwise became bound to the Agreement to Arbitrate in any form that the Agreement to Arbitrate has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at its facility in Herndon, Virginia, and at all other Volkswagen Group of America facilities where the unlawful arbitration agreement is or has been in effect, copies of the attached notice marked "Appendix B."[11] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix B" to all current employees and former employees employed by the Respondent at any time since February 26, 2015.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 12, 2020

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the Agreement to Arbitrate in all its forms, or revise it in all its forms to make clear that the Agreement to Arbitrate does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise became bound to the Agreement to Arbitrate in any form that the Agreement to Arbitrate has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

VW CREDIT, INC.

The Board's decision can be found at www.nlrb.gov/case/13-CA-158715 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
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VOLKSWAGEN GROUP OF AMERICA, INC.

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